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No. 02-750

IN THE
SUPREME COURT OF THE UNITED STATES

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the level of judicial scrutiny articulated by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to legislatively determined monetary exactions imposed as conditions on the development of property, irrespective of the actual impacts the development may have in relation to the stated purpose of the exaction.

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BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF)[1] is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the nation.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.

WLF regularly appears in legal proceedings before federal and state courts to defend the principles of free enterprise, limited government, and the protection of private property rights. In particular, WLF has appeared as a party or *amicus curiae* before this and other courts in cases raising Fifth Amendment regulatory takings claims involving both real property and monetary exactions. *See, e.g.*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996); *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002).

WLF believes that the Takings Clause of the Fifth Amendment was meant to apply to the taking of all private property, regardless of how the property is "taken" by the government -- whether outright, or as a restriction or condition on the use of property, including the imposition of development exactions or so-called impact fees -- and regardless of whether the government's method of taking the property is accomplished at the "retail level" through an ad hoc adjudicatory process, or at the "wholesale level" by a general legislative scheme.

If left intact, the lower court's refusal to apply the Takings Clause would leave the government's growing use of monetary exactions without any meaningful standard of judicial review. Accordingly, amicus believes that it is imperative that the Court grant the Petition and clarify its takings jurisprudence for the benefit of property owners, government regulators, and lower courts alike.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented by the Petitioner. In brief, the corporate headquarters of Rogers Machinery Company, Inc. (Rogers or Petitioner) originally occupied one building. Because the quarters became cramped, Rogers proposed to construct a new adjacent building to relieve the overcrowding. No new employees were to be hired; rather, some 40 current employees would move from the old building into the new building. Pet. 2-3.

As a condition for obtaining a building permit, the City of Tigard required Rogers to pay it $37,102 as a traffic impact fee (TIF). That fee was arrived at by using a legislatively determined formula based upon the hypothetical additional automobile trips that the new development might generate, rather than the amount of trips actually generated. *See* Section 3.17 of the Washington County Code (WCC); Pet. App. 47a.

The avowed purpose of the ordinance, however, is not couched in such hypothetical terms. Rather, the "[p]urpose and scope" of the traffic impact fee is to "ensure that the *new* development contributes to extra capacity transportation improvements *needed* to accommodate additional traffic *generated* by such development." WCC § 3.17.020(A) (emphasis added). Pet. App. 47a. Despite the undisputed fact that the development in this case would not generate any new traffic, Rogers was not allowed to rebut the legislative presumption that it would. Petitioner was required to pay the TIF as a condition for obtaining a building permit to construct the new office building.

Petitioner made an "as applied' rather than a facial takings challenge to the ordinance. Before the Washington County Hearing Officer, Rogers argued that the "fee bears *no relationship* to what is actually taking place at the Site." Pet. App. 43a (emphasis added). Accordingly, the TIF would appear to violate not only *Dolan v. City of Tigard*, 512 U.S. 374 (1994), requiring heightened scrutiny of the exactions, but also the more fundamental "essential nexus" requirement of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

The Oregon Court of Appeals surveyed the case law of both this Court and other courts, and concluded that while the heightened scrutiny standard articulated in *Dolan* could be applied to monetary exactions that are imposed in an ad hoc adjudicatory setting, citing *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), the TIF did not meet that criteria. Rather, the court below concluded that it would not extend *Dolan* (nor, for that matter, any level of Fifth Amendment protection) to a "generally applicable development fee [like the TIF] imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee." *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002); Pet. App. 36a. The Oregon Supreme Court thereafter denied review. *Rogers Machinery, Inc. v. Washington County*, 52 P.2d 1057 (Or. 2002).

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD RESOLVE THE CLEAR SPLIT IN THE LOWER COURTS AS TO WHETHER HEIGHTENED SCRUTINY OF *NOLLAN* AND *DOLAN* APPLIES TO MONETARY EXACTIONS THAT ARE LEGISLATIVELY IMPOSED

The Petitioner has amply and cogently demonstrated that the lower courts are "hopelessly split" on the issue of the applicability of Dolan's heightened scrutiny to legislatively adopted exactions. *See* Pet. 5-12. Indeed, the lower court itself all but invited this Court to review the issues presented. As the Oregon Court of Appeals candidly recognized in its decision:

> The two questions that consequently have generated considerable litigation for lower courts are: (1) Does heightened scrutiny apply to nonpossessory exactions, such as development or impact fees like the TIF imposed in this case? (2) Does that scrutiny apply to exactions imposed through generally applicable legislation rather than individual adjudicative decisions?
>
> In the eight years since *Dolan* was decided, no consensus has emerged among lower courts on those questions and, so far, the Supreme Court has declined to grant certiorari in cases that might have provided further guidance. *See, e.g.*, *Parking Association of Georgia v. City of Atlanta*, 264 Ga 764, 450 S.E.2d 200 (1994), cert. den. 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 277 Ill. App. 3d 926, 214 Ill. Dec. 526 (1995), cert den

> 519 U.S. 976, 136 L. Ed. 2d 325, 117 S. Ct. 413 (1996) (*Dolan* applies to legislatively imposed property development conditions). Lower court authority appears most sharply divided on the issue of *Dolan*'s application to monetary exactions. Some courts have declared, seemingly categorically, that *Dolan* is limited to dedications of property and does not extend to nonpossessory exactions, such as the payment of fees. Other courts have rejected that view, holding that *Dolan* potentially can extend to monetary exactions, at least in some circumstances. A similar split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation.

Pet. App. 21a-22a (footnotes omitted).

To begin with, there should be no doubt regarding the basic underlying proposition in this case: the Takings Clause in general covers requiring the payment of money. On this point, two cases suffice to contradict any doubt regarding the scope of the Takings Clause. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal" subject to the Takings Clause. *Id.* at 172. Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held that a Florida statute confiscating interest, which accrued in an interpleader fund deposited with the state court, violated the Takings Clause. *Id.* at 164. There should remain no question that the Takings Clause generally extends to regulations requiring the payment of money.

To set a lower constitutional standard for monetary exactions than for easements and other real property dedications would invite local land use authorities to skirt

their constitutional duty to compensate by monetizing their demands. Since few land use problems are impervious to the payment of money, this bifurcated approach to exactions would only test whether a local land use authority has "a stupid staff." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). Thus, excluding money from the protection of the Takings Clause would lead to that clause's circumvention.

For example, rather than restricting outright the development of the two beachfront lots at issue in *Lucas*, assume that a "beach impact fee" was instead assessed pursuant to a legislative program as a condition on the issuance of a building permit. Assume further that the impact fee was set at such a high amount that it would either a) be cost prohibitive for the owner to develop the property, and thus, force the owner to leave it in its natural condition as the State originally desired, or b) provide the State with sufficient funds to purchase the property (or similar property) before any development commenced, paying compensation to the owner from the funds that were exacted from him.

More pertinently, the dedications of property interests in the form of easements required as conditions for the issuance of building permits in both *Nollan* and *Dolan* could easily have been monetized in the form of an impact fee. The funds so generated could then be used to purchase the very easements desired by the governmental authorities, all without any meaningful judicial scrutiny, let alone the heightened scrutiny that would otherwise have been required. To permit such an easy method of circumventing the Fifth Amendment would fly in the face of the Supreme Court's clear direction that the Takings Clause is "more than a pleading requirement, and compliance with it . . . more than an exercise in cleverness and imagination." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

It lies beyond dispute that property "denote[s] the group of rights inhering in the citizen's relation to the

physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). A noted constitutional scholar has highlighted the conceptual emptiness of exempting monetary exactions from coverage under the *Nollan* and *Dolan* tests, merely because the government cannot be said to have physically invaded the owner's property:

> Prior to the United States Supreme Court's remand in *Ehrlich*, some state and federal courts drew an artificial distinction between dedications and monetary exactions for purposes of heightened scrutiny. For example, cases from California and various federal circuits lamely had denied heightened scrutiny for exactions on the basis of the lack of physical invasion associated with monetary demands. This kind of "thingness" view of property is enough to give a long-time property instructor the willies, as it suggests that far too many judges apparently forgot or failed to comprehend the conceptual nature of property taught to them in their first year of law school.

Douglas W. Kmiec, *Inserting The Last Remaining Pieces Into The Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1037 (1997).

Having explained why the Takings Clause covers the payment of money and why the distinction between monetary exactions and exactions in other forms cannot be premised on the presence or absence of physical invasion, we are left with the question whether *Nollan* and *Dolan* can be fairly read to exclude monetary exactions from heightened scrutiny. The short answer is that they cannot. At most, the Respondents might claim that they are silent on this precise question, because neither case involved a monetary exaction. But the crucial point is that neither decision says anything to positively exclude monetary exactions.

More importantly, the standards these decisions prescribe—"essential nexus," *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and "rough proportionality," *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)—and the constitutional problems they address, *see* 483 U.S. at 837 and n.5, were framed by this Court in sufficient generality to apply in every exactions case. Monetary exactions are no exception.

Just as it should make no difference as to whether the property being exacted is an interest in real property in the form of a dedication, or the equivalent value in so-called "in lieu of" or impact fees, it should also make no difference as to whether the taking was the result of a particular adjudicative proceeding or the imposition of an across-the-board legislative scheme. Both methods can effectuate a taking of private property, and both can be extortionate in nature. *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decision in* Dolan v. City of Tigard, 75 N.Y.U.L. REV. 242 (2000).

As Justice Thomas concluded about this precise question:

> It is hardly surprising that some courts have applied *Tigard*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. * * * The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.).

Indeed, the property owner in *Nollan* was faced with a general legislative rather than an adjudicative permitting scheme that was administered by the California Coastal Commission. In *Nollan*, the law generally required that a coastal permit for the construction of any new house "whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of [beach] access." 483 U.S. at 830. Despite this general across-the-board requirement for all such development, this Court made clear that an "essential nexus" is required between the exaction of the property interest being demanded in that particular case and the government's interest in imposing it. *Id.* at 841-42.

Just as in *Nollan*, the permit condition in the instant case is imposed across-the-board under a legislative scheme that effectively leaves no discretion to the administrative officials. It is imposed for specified kinds of development, regardless of the actual impact of the development on increased traffic. More significantly, it is imposed despite the concession that there would be *no* traffic impact whatsoever caused by the construction of Petitioner's new building. Thus, the imposition of the TIF should be judged by the express purpose of the ordinance, namely, that it was adopted to "ensure that new development contributes to . . . improvements needed to accommodate additional traffic [actually] *generated* by such development." WCC § 3.17.020; Pet. App. 47a (emphasis added).

Simply put, there is no "additional traffic generated" by Petitioner's development. It should be noted that the TIF in this case is not imposed as a special assessment upon on all existing businesses to pay for governmental expenses associated with handling *current* traffic levels. That would be an entirely different case. Rather, by its own terms, the TIF is imposed to address *new* traffic caused by *new* development.

In short, this Court can easily reverse the lower court because it did not find, nor could it, *any* nexus between the development in question and the TIF imposed. This clearly violates the teachings of *Nollan*, thereby obviating the necessity for this Court to even reach the *Dolan* "rough proportionality" test. By definition, there is *no* proportion, let alone a rough one, between a traffic impact fee and a development that has zero impact on traffic.[2] Indeed, if Petitioner had built a new office building adjacent to a subway stop, and could demonstrate not only that would there be no new employees, but also that the actual automobile trips generated by his current staff would be reduced by fifty percent due to subway use, there would be a *negative* proportion or relationship between the fee imposed and the actual impact of the building on traffic.

At a minimum, amicus urges the Court to grant review in this case to make clear that there is *some* level of heightened judicial review of the imposition of development fees, whether legislatively or administratively determined. As it now stands, the lower court couched its decision in "all or nothing" terms: either *Nollan* and *Dolan* apply or nothing does. The lower court provided no standards for review of such legislatively imposed impact fees; it is, quite simply, standardless. TIF thus impermissibly imposes an irrebuttable presumption that

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[2] Amicus notes that a Petition for Writ of Certiorari similar to the instant one is pending in *Agencia La Esperanza Corp., Inc. v. Orange County Board of Supervisors*, Sup. Ct. No. 02-638. In that case, there was admittedly *some* increased traffic associated with the development in question. However, the issue in that case is whether the significant traffic impact fee imposed by the legislatively adopted fee programs was all of out proportion to the minimal traffic impact actually caused by the development, and thus, violative of the "rough proportionality" standard of *Dolan*. Thus, this Court has the option of granting review in both this case and *Agencia*; alternatively, the Court may prefer to grant one of the Petitions while holding the other in abeyance pending decision of the one granted.

any and all development listed in the legislative scheme generates new traffic.

Quite properly, *Dolan* places the burden on the government to show that the permit condition being imposed is "roughly proportional" to the impact caused by the development. And while amicus submits that the same burden should apply here, shouldn't the property owner in this or any other exaction case at least be afforded the opportunity to voluntarily bear the burden to rebut the government's presumption that his development will cause the legislatively determined impacts? Amicus submits that the answer to that question should be a resounding "yes."[3]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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[3] Amicus notes that not only does the express language of the ordinance speak in terms of actual traffic generated rather than theoretically possible impacts, but also that other language in the ordinance confirms that notion. Thus, the ordinance acknowledges that certain categories of development requiring a building permit may not have been covered in setting traffic impact fee formulas; in such a case, the director may "[a]t the election (and expense) of the applicant, consider *actual* trip generation of a same or similar use verified by a registered traffic engineer." WCC § 3.17.050(B)(2). Pet. App. 52a (emphasis added).